

reference of the City of Portland's interconnection agreement in this application does not violate our rules, or warrant a finding of checklist noncompliance.²⁹²

2. Pricing of Interconnection

89. Checklist item one requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."²⁹³ Section 251(c)(2) requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."²⁹⁴ Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.²⁹⁵

90. AT&T argues that in New Mexico, beginning in December 2002, Qwest deemed local traffic that is terminated on a third party's network to be "access" traffic subject to access charges, rather than interconnection traffic subject to TELRIC rates.²⁹⁶ AT&T asserts that these calls are "indisputably local calls" whether they terminate on Qwest's network or another carrier's network.²⁹⁷ AT&T states that the Act and the Commission's rules require Qwest to charge TELRIC rates for such local traffic and that Qwest's failure to do so is a violation of checklist item one.²⁹⁸

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6, Public Utility Commission of Oregon, Affidavit of James R. Deason, Exhibit E, Letter from Kelly A. Cameron, Qwest, to James Deason, City of Portland, dated April 18, 2002, at 4, filed Jun. 5, 2002) (claiming that Qwest has no legal obligation under the interconnection agreement or the Act to provision facilities and services for the City of Portland as a competitive LEC for its own use or for the use of affiliated entities); 47 U.S.C. § 251; 47 USC § 153 (44). *See also*, generally, Qwest Application, App. N, Oregon, Vol. 5a, Tab 21, Qwest Answer in Docket No. IC 6 (filed Jun. 28, 2002). The Complaint was dismissed, and the parties proceeded with arbitration as provided by the parties' interconnection agreement.

²⁹² Including the City of Portland, Qwest lists 122 wireline interconnection agreements in Appendix L for Oregon, on which Qwest relies to establish checklist compliance. *See* Qwest Application, Appendix L, Vol. 1, Tabs 1-122. "Qwest's application does note that Qwest is providing the City of Portland with collocation under its interconnection agreement." *See* Qwest Reply at 58 n.66. Moreover, Qwest relies on collocation arrangements with a total of 27 competitive LECs. *See* Qwest Application at 37-38.

²⁹³ 47 U.S.C. § 271(c)(2)(B)(i).

²⁹⁴ *Id.* § 251(c)(2).

²⁹⁵ *Id.* § 252(d)(1).

²⁹⁶ AT&T Comments at 27. The dispute appears to cover billing for the period of Dec. 14, 2002 through March 5, 2003. Letter from James P. Young, Counsel for AT&T, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed April 1A, 2003) (AT&T Apr. 1A *Ex Parte* Letter).

²⁹⁷ AT&T Comments at 28.

²⁹⁸ AT&T Comments at 28; AT&T Reply at 17. AT&T alternates between describing Qwest's actions as a violation of the Commission's interconnection pricing and reciprocal compensation rules. AT&T Comments at 27- (continued....)

91. Qwest responds that AT&T's allegations do not amount to a checklist violation but rather concern Qwest's performance under its interconnection agreement.²⁹⁹ Qwest states that its interconnection agreement provides that transit traffic will be charged at TELRIC rates if it is routed between the carriers on separate trunk groups, i.e., if the traffic is not commingled with non-local traffic.³⁰⁰ Qwest argues that the dispute concerns the proper rates that Qwest may apply when AT&T commingles local transit traffic with switched access and other local traffic on switched access trunks.³⁰¹ Qwest asserts that it has applied access charges to such commingled traffic for several years.³⁰² Qwest contends that AT&T raised this dispute for the first time in this section 271 proceeding.³⁰³ According to Qwest, disputes about whether a carrier is complying with an interconnection agreement are beyond the scope of section 271 proceedings and should be handled by the state commission in the first instance.³⁰⁴

92. We conclude that, as Qwest asserts, this dispute is, indeed, about compliance with an interconnection agreement.³⁰⁵ A clear indication that the core of this dispute involves an interpretation of the terms of a contract is AT&T's claim that "[t]he *interpretation* that all parties have observed until now is the only *interpretation* consistent with both the law and the terms of

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28; AT&T Reply at 13-17. We note, however, that for the reasons that we state here, we reach the same disposition of its claims in either case.

²⁹⁹ Qwest Reply at 48.

³⁰⁰ Qwest Thompson/Freeberg Reply Decl., para. 18 n.27. Qwest also states that, while it does not concede either the merits of AT&T's position or its relevance for evaluating section 271 proceedings, it is "willing to accede to AT&T's request in this matter. Thus, going forward and for as long as the current New Mexico agreement is in effect, Qwest is willing to apply the TELRIC-based rate to local transit traffic that AT&T sends to Qwest on a Feature Group D trunk" Qwest Thompson/Freeberg Reply Decl., para. 19 n.29. We note that we do not base our decision on this.

³⁰¹ Qwest Thompson/Freeberg Reply Decl., para. 18.

³⁰² Qwest Thompson/Freeberg Reply Decl., para. 18.

³⁰³ Qwest Reply at 48.

³⁰⁴ Qwest Thompson/Freeberg Reply Decl., para. 19.

³⁰⁵ Although we do not address the merits of AT&T's assertion that Commission rules require Qwest to provide transit service under section 251(c)(2), we note that the Commission has not had occasion to determine whether incumbent LECs have such a duty, and we find no clear Commission precedent or rules declaring such a duty. *Joint Application by BellSouth Corporation, BellSouth Telecommunications Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Memorandum Opinion and Order, 17 FCC Rcd 17595, 17719, para. 222 n.849. (*BellSouth Multistate Order*). In the absence of a duty to provide transit service at TELRIC rates, we note that the state commission did not commit clear error in finding that Qwest provides interconnection in compliance with checklist item one. *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307, Memorandum Opinion and Order, 17 FCC Rcd 25828, 25910-11, para. 155 (*BellSouth Florida/Tennessee Order*).

the agreement.”³⁰⁶ Whether one carrier is routing traffic pursuant to the terms of an interconnection agreement is more appropriately considered in a proceeding other than a section 271 review.³⁰⁷ Accordingly, we conclude that this dispute should be resolved in a different forum.

B. Checklist Item 4 – Unbundled Local Loops

93. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”³⁰⁸ Based on the evidence in the record, we conclude, as did the state commissions, that Qwest provides unbundled local loops in accordance with the requirements of section 271 and our rules.³⁰⁹ Our conclusion is based on our review of Qwest’s performance for all loop types – which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, and high capacity loops – as well as hot cut provisioning and our review of Qwest’s processes for line sharing and line splitting.³¹⁰ As of December 31, 2002, competitors have acquired from Qwest and placed into use approximately 6,684 stand-alone unbundled

³⁰⁶ AT&T Comments at 28 (emphasis added).

³⁰⁷ See, e.g., *Application of Verizon Maryland Inc., Verizon Washington, D.C. Inc., and Verizon West Virginia Inc., et. al., Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, Memorandum Opinion and Order at 87, para. 146 (Mar. 19, 2003) (“While we do not require parties to raise all pricing issues elsewhere before raising them in a section 271 proceeding, it is both impractical and inappropriate for us to make these sorts of fact-specific findings regarding compliance with interconnection agreements in a section 271 review when the issue was not previously raised in the appropriate forum.”). *Accord Application of Verizon New England, Inc., Bell Atlantic Communications, Inc., (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization To Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 02-7, Memorandum Opinion and Order, 17 FCC Rcd 7625, 7636, para. 20 (2002) (*Verizon Vermont Order*); *BellSouth Florida/Tennessee Order*, 17 FCC Rcd at 25910-11, para. 155.

³⁰⁸ 47 U.S.C. § 271(c)(2)(B)(iv); see also Appendix F at paras. 48-52 (regarding requirements under checklist item four).

³⁰⁹ See New Mexico Commission Comments at 47; Oregon Commission Comments at 12; South Dakota Commission Comments at 6. In addition, the Department of Justice recommended approval of Qwest’s application, subject to the Commission’s assuring itself that all concerns raised have been resolved. See Department of Justice Evaluation at 2, 11-12.

³¹⁰ We note that our review encompasses Qwest’s performance and processes for all loop types, but as noted below, our discussion does not address every aspect of Qwest’s loop performance where our review of the record satisfies us that Qwest’s performance is in compliance with the applicable parity and benchmark measures. We also note that WorldCom points to performance failures in broad metric categories without addressing specific metrics in the application states. See WorldCom Comments at 18; WorldCom Lichtenberg Decl., para. 32. We have reviewed the performance results in all of the metric categories WorldCom addresses for each of the application states and we find that Qwest’s performance in the application states does not warrant a finding of checklist noncompliance. See also Qwest Reply at 41-44.

loops in New Mexico,³¹¹ 53,918 stand-alone unbundled loops in Oregon,³¹² and 7,540 stand-alone unbundled loops in South Dakota.³¹³

94. Consistent with the Commission's prior section 271 orders, we do not address every aspect of Qwest's loop performance where our review of the record satisfies us that Qwest's performance is in compliance with the parity and benchmark measures established in the three application states.³¹⁴ Instead, we focus our discussion on those areas where the record indicates discrepancies in performance between Qwest and its competitors. In making our assessment, we review performance measurements comparable to those the Commission has relied upon in prior section 271 orders, primarily those associated with measuring the timeliness and quality of loop provisioning and loop maintenance and repair.³¹⁵ As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.³¹⁶ Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.³¹⁷ We generally find that disparity in one or two months out of the five-month reporting period is isolated and therefore not competitively significant.³¹⁸

95. Finally, we note that order volumes with respect to certain categories of loops, or order volumes with respect to a specific metric for a certain category of loop, in a given month

³¹¹ See Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11, Attach. at 1 (filed February 20A, 2003) (Qwest Feb. 20A *Ex Parte* Letter). In New Mexico, as of December 31, 2002, Qwest had in service 4,532 unbundled voice grade analog loops, 2,103 xDSL-capable loops, 49 high capacity loops, and 1,528 unbundled shared loops. *See id.*

³¹² See Qwest Feb. 20A *Ex Parte* Letter, Attach. at 1. In Oregon, as of December 31, 2002, Qwest had in service 45,513 unbundled voice grade analog loops, 6,284 xDSL-capable loops, 2,121 high capacity loops, and 1,638 unbundled shared loops. *See id.*

³¹³ See Qwest Feb. 20A *Ex Parte* Letter, Attach. at 1. In South Dakota, as of December 31, 2002, Qwest had in service 7,337 unbundled voice-grade analog loops, 160 xDSL-capable loops, 43 high capacity loops, and 0 unbundled shared loops. *See id.*

³¹⁴ See, e.g., *Qwest 9-State Order*, 17 FCC Rcd at 26485-86, para. 336.

³¹⁵ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9078-79, para. 162.

³¹⁶ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

³¹⁷ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

³¹⁸ See, e.g., MR-3 (Out of Service Cleared Within 24 Hours – Non-Dispatch) for line shared loops in Oregon; MR-3 (Out of Service Cleared Within 24 Hours – Dispatch) for line shared loops in New Mexico; MR-4 (All Troubles Cleared Within 48 Hours – Dispatch) for line shared loops in New Mexico; MR-5 (All Troubles Cleared Within Four Hours) for DS1-capable loops in New Mexico; MR-7 (Repair Repeat Report Rate) for unbundled analog loops in South Dakota; MR-8 (Trouble Rate) for DS1-capable loops in South Dakota; MR-8 (Trouble Rate) for ISDN-capable loops in Oregon; OP-5 (New Service Installation Quality) for DS1-capable loops in Oregon.

for one or more of the states included in this application may be too low to provide a meaningful result. As a result, we may look to Qwest's performance in Colorado, where volumes are generally higher, to inform our analysis.

96. *xDSL-Capable Loops.* Qwest demonstrates that it provides xDSL-capable loops in a nondiscriminatory manner. Qwest, however, fails to meet parity under the new installation quality measure for a subcategory of xDSL loops provided in Oregon – ADSL-qualified loops.³¹⁹ Although Qwest missed parity under this measure for three months during the relevant period, we note that these performance results were based on relatively low volumes, and we recognize the difficulties associated with drawing strong conclusions based on low volumes of data.³²⁰ We therefore find that Qwest's performance with regard to ADSL-qualified loops in Oregon does not result in a finding of checklist noncompliance.³²¹ In addition, we recognize that Qwest does not meet parity for three months with respect to installation commitments met for conditioned loops in New Mexico.³²² Although there were low volumes of orders for conditioned loops in some months in New Mexico,³²³ the five-month average performance is near the benchmark.³²⁴ Therefore, we do not find these performance disparities to be competitively significant.

97. *High Capacity Loops.* Qwest demonstrates that it provides high capacity loops in a nondiscriminatory manner.³²⁵ Qwest, however, does not achieve parity under the trouble rate

³¹⁹ See OP-5 (New Service Installation Quality) for ADSL-qualified loops in Oregon, indicating a disparity in September, December, and January with competitive LEC trouble free installation results of 75.00%, 64.29%, and 86.67%, compared to Qwest results of 97.81%, 100%, and 100% respectively.

³²⁰ The September result was based on only eight orders, while the December and January results were based on 14 and 15 orders respectively for installation of ADSL-qualified loops in Oregon. See OP-5 (New Service Installation Quality) for ADSL-qualified loops in Oregon.

³²¹ Moreover, recognizing the difficulty of drawing meaningful conclusions from low volumes, we look to Qwest's performance in Colorado on this metric. In this case, we are unable to draw conclusions based on the Colorado data because there were no orders under this metric during the relevant five-month period. See OP-5 (New Service Installation Quality) for ADSL-qualified loops in Colorado.

³²² See OP-3 (Installation Commitments Met) for conditioned loops in New Mexico, indicating a disparity in September, November, and January. The rates of installation commitments met for competitive LECs were 83.33%, 50.00%, and 83.33%, compared to the 90% benchmark.

³²³ In September, competitive LECs ordered 24 unbundled conditioned loops in New Mexico, but the number of orders fell to only two in November and six in January. See OP-3 (Installation Commitments Met) for conditioned loops in New Mexico.

³²⁴ See OP-3 (Installation Commitments Met) for conditioned loops in New Mexico, indicating a five-month average for September through January of 87.27%, compared to the 90% benchmark. See also Qwest Williams Decl., para. 366.

³²⁵ See generally OP-3 (Installation Commitments Met); OP-4 (Installation Interval); OP-5 (New Service Installation Quality); MR-6 (Mean Time to Restore); MR-7 (Repair Repeat Report Rate); and MR-8 (Trouble Rate) for DSL-capable loops.

measure of maintenance and repair quality for DS1-capable loops in Oregon.³²⁶ Although troubles for competitive LECs were reported slightly more often than for Qwest's retail customers, we find that these disparities are not competitively significant given the relatively low competitive LEC trouble rate.³²⁷ In addition, Qwest explains that it has implemented a program to further improve performance in Oregon, including additional training, quality checks, field audits, and outside plant rehabilitation.³²⁸ Thus, we find that Qwest's performance with respect to high capacity loops does not warrant a finding of checklist noncompliance.

98. *Other Issues.* The City of Portland contends that Qwest fails to comply with its obligation to provide nondiscriminatory access to unbundled loops.³²⁹ Specifically, the City of Portland claims that Qwest refuses to provision loops, or any other service or element, ordered by the city pursuant to its state commission-approved interconnection agreement with Qwest.³³⁰ The City of Portland explains that this dispute is subject to a pending arbitration proceeding pursuant to the arbitration clause of the interconnection agreement.³³¹ As discussed above, we find that this carrier-specific issue more appropriately will be resolved through the pending arbitration proceeding or the section 208 complaint process than in a section 271 proceeding.³³² Accordingly, we decline to find that this allegation warrants a finding of checklist noncompliance.

C. Checklist Item 5 – Unbundled Local Transport

99. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide “[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from

³²⁶ See MR-8 (Trouble Rate) for DS1-capable loops in Oregon, indicating a disparity in September, October, December, and January with competitive LEC results of 2.00%, 1.63%, 2.19%, and 1.93%, compared to Qwest results of 1.44%, 1.03%, 1.14%, and 1.28%.

³²⁷ In Oregon, the five-month average for the competitive LEC trouble rate is 1.81%. This five-month average is well below 3%, which we have found to be acceptable in past section 271 orders. See *Qwest 9-State Order*, 17 FCC Rcd at 26488, para. 340 n.1237; *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02-61, Memorandum Opinion and Order, 17 FCC Rcd 11659, 11691, para. 49 n.209 (2002) (*Verizon Maine Order*).

³²⁸ See Qwest Williams Decl., para. 382.

³²⁹ See City of Portland Comments at 6.

³³⁰ See City of Portland Comments at 1, 3-4.

³³¹ See City of Portland Comments at 4.

³³² See section IV.A.1, *supra*.

switching or other services.”³³³ Based on our review of the record, we conclude, as did each state commission, that Qwest complies with the requirements of this checklist item.³³⁴

100. AT&T alleges that Qwest levies unlawful non-distance sensitive charges for the “entrance facility” linking the competitive LEC switch and the Qwest serving wire center.³³⁵ These allegations are raised in the context of both interconnection and unbundled transport.³³⁶ When used as a UNE in unbundled transport, the entrance facility may also be known as extended unbundled dedicated interoffice transport (EUDIT).³³⁷ AT&T contends that Qwest’s distinction between entrance facilities, including EUDIT,³³⁸ and interoffice transport between Qwest switches is unreasonable, discriminatory and serves only to raise the cost of transport to

³³³ 47 U.S.C. § 271(c)(2)(B)(v); *see also* Appendix F, para. 53.

³³⁴ *See* Qwest Application App. A, Tab 15, Declaration of Karen A. Stewart (Qwest Stewart Transport Decl.), paras. 1-8 (citing state 271 orders in New Mexico, Oregon and South Dakota that demonstrate compliance with this checklist item); New Mexico Commission Comments at 34, 47-49; Oregon Commission Comments at 13 (citing Workshop 3 Report of the state commission’s 271 proceeding); South Dakota Commission Comments at 4-6. We reject the City of Portland’s claim that, in rejecting its transport orders, Qwest has failed to comply with checklist item 5. *See* City of Portland Comments at 7. As discussed above, we find that this dispute appears to be whether the City of Portland is a telecommunications carrier under the Act and is not appropriately considered in the context of our section 271 application.

³³⁵ AT&T April 1A *Ex Parte* Letter at 1.

³³⁶ AT&T April 1A *Ex Parte* Letter at 1. Qwest offers entrance facilities both as part of its local interconnection trunk offerings under section 251(c)(2) of the Act and as dedicated transport UNEs under section 251(c)(3) of the Act. Qwest Thompson/Freeberg Reply Decl., para. 4 n.1. We analyze this issue under unbundled local transport, checklist item five, rather than under interconnection pricing, checklist item one, but the outcome is the same.

³³⁷ Letter from David L. Sieradzki, Counsel for Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 at 3 (filed April 4B, 2003) (Qwest Apr. 4B *Ex Parte* Letter). Qwest clarifies that while entrance facilities and the EUDIT element are functionally similar, they are different in several respects and are distinct offerings in the SGAT. *Id.* at 2-3 (clarifying previous Qwest information noted in the *Qwest 9-State Order*, 17 FCC Rcd at 26497, para. 351 n.1284). “Unlike LIS [local interconnection service] Entrance Facilities, EUDIT (UNE) facilities are dedicated exclusively to the use of the CLEC and the rate is not adjusted to reflect Qwest’s relative use of the facilities. As with other UNEs, EUDIT may be ordered in combination with other UNEs, but generally may not be commingled with facilities for non-local service. Moreover, like other UNEs, EUDIT may be (and often is) connected to a CLEC’s collocation facility; by contrast, carriers use LIS Entrance Facilities as an alternative to collocation to establish connections between their networks and Qwest’s network.” Qwest Apr. 4B *Ex Parte* Letter at 3 (emphasis in original).

³³⁸ Reference to entrance facilities in general includes EUDIT since Qwest also refers to them collectively. *E.g.*, Letter from David L. Sieradzki, Counsel for Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, Thompson Colorado Pricing Declaration, Ex. JLT-CO-xx Attach. at 3, WC Docket No. 03-11 (filed Feb. 14, 2003) (Qwest Feb. 14B *Ex Parte* Letter, Thompson Colorado Pricing Decl. Attach). “Entrance facilities (i.e., entrance facilities or E-UDIT) [are] defined as the transmission path between a Qwest end office and a CLEC office.” *Id.* at 3. AT&T also asserts that the same issue it raises with respect to entrance facilities applies to Qwest’s UDIT and EUDIT charges for transport. AT&T Comments at 23 n.66.

competitive LECs.³³⁹ Interoffice transport, generally, refers to direct trunked transport in the case of interconnection and unbundled dedicated interoffice transport (UDIT) in the UNE context of unbundled transport. These interoffice transport charges are flat-rated and *distance sensitive*, and apply to transport between Qwest's wire centers, end offices, or tandem switches in the same LATA and state.³⁴⁰ AT&T alleges that Qwest's flat-rated, *non-distance sensitive* entrance facility charges are unlawful because they fail to reflect the way costs are incurred.³⁴¹ AT&T claims it should be able to pay a single distance sensitive rate for the entire link between its switch and the ultimate Qwest switch.³⁴²

101. The majority of AT&T's arguments were rejected in the *Qwest 9-State Order*.³⁴³ As we explained there, we do not believe the Qwest rate structure for entrance facilities violates our general rate structure rules because our rules do not require distance sensitive pricing for such facilities.³⁴⁴ Further, we deferred to the relevant states because AT&T had presented no evidence to conclude that they had made a clear error in applying our TELRIC rules.³⁴⁵ We reach the same conclusion in this proceeding, as we explain below.

102. As a preliminary matter, AT&T raises issues related to rate design in proposing to combine the direct trunk transport rate and the entrance facility rate into a single distance

³³⁹ AT&T Comments at 23-24; AT&T Comments Ex. 1, Declaration of Kenneth L. Wilson, paras. 7, 11-12 (AT&T Wilson Decl.).

³⁴⁰ *Qwest 9-State Order*, 17 FCC Rcd at 26497-98, para. 351; Letter from David L. Sieradzki, Counsel for Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, Thompson Colorado Pricing Declaration, Ex. JLT-CO-xx Attach. at 3, WC Docket No. 03-11 (filed Feb. 14, 2003) (Qwest Feb. 14B *Ex Parte* Letter, Thompson Colorado Pricing Decl. Attach) ("Direct trunk transport (i.e., DTT or UDIT) is defined as the transmission path between two Qwest end offices.").

³⁴¹ AT&T Comments at 24, 27; AT&T Wilson Decl., para. 5 (citing 47 C.F.R. § 51.507, general rate structure standard).

³⁴² AT&T Comments at 27 n.77.

³⁴³ *Qwest 9-State Order*, 17 FCC Rcd at 26497-98, paras. 351-53. Qwest also responds to AT&T's claim that Qwest "requires" competitive LECs to pay entrance facility charges by asserting that "CLECs can avoid a local interconnection trunking entrance facilities charge by choosing to employ collocated equipment, a mid-span meet, or an existing facility that was deployed for other purposes, (i.e., exchange access)." Qwest Thompson/Freeberg Reply Decl., para. 6. Qwest also argues that its SGAT provides that competitive LECs can opt to construct their own entrance facilities and impose the same charges on Qwest. *Id.*

³⁴⁴ *Qwest 9-State Order*, 17 FCC Rcd at 26498, para. 352. We note that Qwest has since clarified here that while EUDIT is a dedicated entrance facility, not all entrance facilities may be dedicated, as appears to be the case with local interconnection service entrance facilities that provide two-way trunking of local traffic. Qwest Apr. 4B *Ex Parte* Letter at 2-3. This does not change our analysis of these rates because our rate structure rules permit but do not require that charges for either dedicated or shared facilities be based on distance. See 47 C.F.R. § 51.507(b) and (c).

³⁴⁵ *Qwest 9-State Order*, 17 FCC Rcd at 26498, para. 352.

sensitive, flat rate element.³⁴⁶ The Commission has stated that as a general matter, rate design is appropriately decided by state commissions in the first instance.³⁴⁷ AT&T raises complex and fact-specific engineering and cost issues in this proceeding. The New Mexico, Oregon and South Dakota Commissions considered cost models and adjustments to inputs in extensive cost and pricing hearings at which these issues could have been raised. Each of the three state commissions demonstrated a commitment to TELRIC principles in setting UNE prices.³⁴⁸ As we have made clear, it is generally impracticable for the Commission to make fact-specific findings in the context of a section 271 proceeding when the state commission's findings were not challenged in the underlying state proceeding.³⁴⁹ We have previously stated that we cannot conduct a *de novo* rate proceeding in a section 271 review.³⁵⁰ When a party raises a challenge to a pricing issue in the Commission's section 271 proceeding that was not raised in the state commission pricing proceedings which underlie the rates at issue without showing why it could not be raised at that time, we will not find that the objecting party persuasively rebuts the *prima facie* showing of TELRIC compliance if the BOC provides a reasonable explanation concerning the issues raised by the objecting party.³⁵¹ Moreover, we have specifically found that challenges to an entrance facility rate should be brought before state commission pricing proceedings.³⁵² AT&T previously did not do so.³⁵³

103. We note that AT&T raised the UDIT/EUDIT pricing distinction issue during state 271 proceedings held in Oregon and New Mexico. The Oregon Commission deferred the issue to its ongoing cost proceeding.³⁵⁴ In New Mexico, the state commission on November 20, 2001

³⁴⁶ AT&T Wilson Decl., para. 12; *see also* AT&T Comments at 24, 27 n.77; Qwest Feb. 14B *Ex Parte* Letter, Thompson Colorado Pricing Decl. Attach. at 3.

³⁴⁷ *BellSouth Multistate Order*, 17 FCC Rcd at 17638, para. 89 n.279 (concerning recovery of switching costs and citing the *Verizon New Jersey Order*, 17 FCC Rcd at 12300-01, para. 58 (concerning recovery of labor costs associated with DUF rates)).

³⁴⁸ *See* section III.B.3.b., *supra*.

³⁴⁹ *E.g.*, *Verizon Vermont Order*, 17 FCC Rcd at 7636, para. 20.

³⁵⁰ *Id.*

³⁵¹ *BellSouth Multistate Order*, 17 FCC Rcd at 17611, para. 32.

³⁵² *Application by Verizon Virginia Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-14, Memorandum Opinion and Order, 17 FCC Rcd 21880, 21954 at para. 133 (*Verizon Virginia Order*).

³⁵³ AT&T did not propose a different structure for dedicated transport in the cost proceedings on which rates initially were based. Qwest Feb. 14B *Ex Parte* Letter, first attachment at 1.

³⁵⁴ Qwest Application App. C (Oregon), Vol. 1, Tab 11, *Investigation into the Entry of Qwest Corporation, formerly known as U S West Communications, Inc., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, Oregon Commission, Workshop 3 Findings and Recommendation Report of the Commission, Docket No. UM 823 at 14-16 (Dec. 21, 2001). The Oregon Commission agreed with the ALJ's (continued....)

agreed with AT&T on an interim basis and deferred a final decision to the ongoing state cost proceeding.³⁵⁵ The New Mexico Commission as an interim measure ordered Qwest to base EUDIT rates for interconnection on the flat-rate distance sensitive rate structure used for UDIT.³⁵⁶ The New Mexico Commission recently found, however, that there was a discrepancy in Qwest's SGAT Exhibit A for the EUDIT rate and ordered Qwest to revise its SGAT in compliance with the state commission's prior interim order.³⁵⁷ After Qwest did so,³⁵⁸ AT&T now suggests that the difference between the rates for EUDIT and entrance facilities in New Mexico is evidence that Qwest's entrance facility rates are not TELRIC compliant.³⁵⁹ The New Mexico Commission modified the EUDIT rate as an interim measure in response to AT&T raising its claims in the state 271 proceeding. To the extent that AT&T believes that the EUDIT rate should be applied to all entrance facilities in New Mexico, AT&T should also raise this fact-intensive rate issue with the New Mexico Commission, rather than raising it for the first time in this section 271 proceeding.³⁶⁰ Since Qwest's updated SGAT in New Mexico currently reflects

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recommendation not to "prejudge" this issue in the state 271 proceeding since it was pending in the open UM 1025 cost docket. *Id.* at 15-16.

³⁵⁵ Qwest Application App. C (New Mexico), Vol. 1, Tab 5, *Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, New Mexico Commission, Order Regarding Facilitator's Report on Checklist Item 2 (Access to Unbundled Network Elements), Checklist Item 4 (Access to Unbundled Loops), Checklist Item 5 (Access to Unbundled Local Transport) and Checklist Item 6 (Access to Unbundled Local Switching), Utility Case No. 3269 at 68-70 (Nov. 20, 2001).

³⁵⁶ *Id.* at 69-70. The New Mexico Commission decided as an interim measure, until the issue could be addressed in the ongoing cost docket, "pricing for the UDIT/EUDIT UNE (the entire dedicated transport link between points) should be based on a distance sensitive, flat rate charge, modeled on Qwest's current UDIT rate structure." Qwest was given "the option in [the state] cost docket of revising its UDIT/EUDIT rates to reflect the difference in the cost of service (assuming such a showing can be made)." *Id.* AT&T, however, did not participate initially in Phase A or B of the cost docket (Docket No. 3495). Letter from David L. Sieradzki, Counsel for Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 4A, 2003) (Qwest Mar. 4A *Ex Parte* Letter). We note that the New Mexico Commission reopened Phase A of this docket on March 20, 2003, allowing parties an added chance to address EUDIT pricing.

³⁵⁷ *Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process and Consideration of Costing and Pricing Rules for OSS, Collocation, Shared Transport, Non-Recurring Charges, Spot Frames, Combination of Network Elements and Switching, and Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Order Regarding Interim Pricing Structure for Extended Unbundled Dedicated Interoffice Transport, Utility Case Nos. 3269, 3495 and 03-00025-UT (March 20, 2003) (*New Mexico Commission EUDIT Compliance Order*).

³⁵⁸ Qwest revised its EUDIT rate on March 27, 2003 in the Second Amended Exhibit A to Qwest's Eleventh Revised SGAT in New Mexico. Letter from David L. Sieradzki, Counsel for Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 28A, 2003) (EUDIT Pricing *Ex Parte*) (attaching Qwest's compliance filing in response to the state commission order).

³⁵⁹ AT&T Apr. 1A *Ex Parte* Letter at 3.

³⁶⁰ AT&T cites information which apparently was previously provided by Qwest in the *Qwest 9-State Order* to support AT&T's assertion that EUDIT and entrance facility charges should be the same. AT&T Apr. 1A *Ex Parte* (continued....)

the rate structure that AT&T desires for EUDIT, and this issue is properly before the New Mexico Commission in present cost proceedings, we address AT&T's overall criticism of the entrance facility rates for all three states and of the EUDIT in Oregon and South Dakota.³⁶¹

104. AT&T presents some evidence here that it did not raise in the *Qwest 9-State Order* to support its basic contention -- that the charge for trunks between a competitive LEC switch and a Qwest switch should be priced the same way as trunks between Qwest switches because there is "no economic or engineering difference whatsoever" between these two types of facilities.³⁶² AT&T seeks to refute Qwest's position that there are economies of scale and scope that reduce the per-trunk cost for trunks between Qwest offices, compared with entrance facilities.³⁶³ AT&T further disputes Qwest's contention that costs for entrance facilities also are higher because they require additional electronics.³⁶⁴ AT&T argues, in large part, that since the calling volumes of these two facilities are comparable, so are their economies of scale and the amount of electronics equipment they require.³⁶⁵

105. Qwest disputes AT&T's argument that entrance facilities and interoffice transport experience comparable calling volumes. Qwest provides evidence that interoffice transport facilities serve multiple purposes, including carrying its own traffic routed in multiple directions through its network and the additional traffic of numerous competitive LECs and interexchange carriers.³⁶⁶ As a result, Qwest states that "interoffice transport circuits generally run over much

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Letter at 3; *Qwest 9-State Order*, 17 FCC Rcd at 26497, paras. 351 n.1284. As we noted above, Qwest in this proceeding clarifies that while entrance facilities and the EUDIT element are functionally similar, they are different in several respects and are distinct offerings in the SGAT. *Qwest Apr. 4B Ex Parte Letter* at 2-3.

³⁶¹ As noted above, we do not base our decision on the rate design or structure for UDIT/EUDIT that a particular state has implemented, but rather, we rely on whether states comply with TELRIC principles and our rules.

³⁶² AT&T Comments at 24.

³⁶³ AT&T Comments at 25; AT&T Wilson Decl. at paras. 13-15; AT&T Apr. 1A *Ex Parte Letter* at 1-3. In the *Qwest 9-State Order*, the Commission noted that AT&T had not refuted Qwest's assertions regarding economies of scale and the need for additional electronics for links to competitive LEC offices. *Qwest 9-State Order*, 17 FCC Rcd at 26498, para. 353.

³⁶⁴ AT&T Comments at 26-27; AT&T Wilson Decl. at paras. 16-19; AT&T Apr. 1A *Ex Parte Letter* at 1-3. "[T]he electronics necessary for these 'entrance facilities' are comparable to those Qwest uses on its own interoffice transport." AT&T Comments at 26.

³⁶⁵ AT&T Comments at 25. "Given that Qwest and CLECs are exchanging a very large volume of traffic between large switches over these 'entrance facilities,' it should be apparent that the 'economies of scale and scope' for such facilities are comparable to those on transport between Qwest switches." *Id.*; see also AT&T Wilson Decl., para. 15. "[T]hese [entrance] facilities frequently carry call volumes comparable on average to call volumes on transport connecting Qwest's wire centers [and] the electronics necessary for these 'entrance facilities' are comparable to those Qwest uses on its own interoffice transport." AT&T Wilson Decl., para. 16.

³⁶⁶ *Qwest Feb. 14B Ex Parte Letter*, first attachment at 3. Since the Qwest wire center, unlike a competitive LEC switch, is often a hub for multiple provider traffic, according to Qwest, AT&T's comparison of the size of a competitive LEC switch with that of an incumbent LEC in terms of number of lines served, is not necessarily indicative of the amount of traffic that is transported over the interoffice facility versus the entrance facility. *Qwest (continued....)*

higher capacity transmission facilities than entrance facilities.”³⁶⁷ Consequently, greater economies of scale are realized for interoffice transport than entrance facilities because “all else being equal, any given DS1 capacity costs much less to provide when deployed over a high-capacity transmission facility, containing many other such circuits over which the placement and other costs can be spread.”³⁶⁸ Qwest contends that entrance facilities have only one purpose -- to connect a competitive LEC point of presence with a Qwest wire center.³⁶⁹ Accordingly, lower capacity transmission facilities are used and fewer opportunities exist to spread costs across multiple uses. Qwest also contends that entrance facilities require additional electronic equipment that raises their cost compared with interoffice facilities.³⁷⁰ It challenges AT&T’s assertion that “there is minimal need for multiplexing functions at the Qwest ‘serving wire centers’ connected to CLEC ‘entrance facilities’”³⁷¹ by explaining why Qwest believes entrance facilities do require additional multiplexers or other electronic equipment.³⁷²

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Reply at 46; Qwest Thompson/Freeberg Reply Decl., para. 11. *But see* AT&T Apr. 1A *Ex Parte* Letter at 1-2 (asserting that “[a] CLEC carries all types of traffic between its switch and the Qwest switch . . . just as Qwest does between its own offices.”).

³⁶⁷ Qwest Feb. 14B *Ex Parte* Letter, first attachment at 3. “For example, in Oregon, New Mexico and South Dakota, Qwest has not provisioned any entrance facilities to CLECs using a system with a capacity higher than OC-3; by contrast, in Oregon and New Mexico, 96% to 100% of Qwest’s interoffice transmission facilities are at OC-48 capacity.” Qwest Thompson/Freeberg Reply Decl., para. 12. In South Dakota, Qwest states about 65% of its interoffice facilities are at OC-48. Qwest Reply at 46.

³⁶⁸ Qwest Feb. 14B *Ex Parte* Letter, first attachment at 3; *see also* Qwest Thompson/Freeberg Reply Decl., paras. 10-12.

³⁶⁹ Qwest Feb. 14B *Ex Parte* Letter, first attachment at 2; Qwest Thompson/Freeberg Reply Decl., para. 11.

³⁷⁰ Qwest Reply at 47.

³⁷¹ AT&T Wilson Decl., para. 18; Qwest Feb. 14B *Ex Parte* Letter, first attachment at 3. “An interoffice circuit linking any two Qwest central offices within a local calling area, more often than not, originates at one office and terminates at the other *without* passing through an intermediate office, and thus *without* any need for intervening electronics, because Qwest offices commonly have direct links to most other offices in the local calling area. By contrast, CLEC offices rarely have direct links to more than one or two offices in the area, and thus in most cases dedicated circuits must pass through an intermediate point (the serving wire center) and must be accompanied by additional multiplexers or other electronic equipment.” Qwest Feb. 14B *Ex Parte* Letter, first attachment at 3 (emphasis in original). This is because, according to Qwest “traffic on an entrance facility is destined for multiple Qwest wire centers and must be disaggregated and multiplexed to the higher interoffice transport level.” Qwest Reply at 47.

³⁷² Qwest Feb. 14B *Ex Parte* Letter, first attachment at 3. Qwest states that the highest level of competitive LEC aggregated traffic that will be terminating at many Qwest wire centers is no larger than OC-3 and therefore, electronic equipment is required to multiplex and regenerate this traffic. “[T]he OC-3 level of traffic must be multiplexed down at the serving wire center, distributed to multiple interoffice facilities and multiplexed up to the OC-48 level for interoffice transport.” Qwest Thompson/Freeberg Reply Decl., para. 14. Qwest also asserts, “The circuit generation electronics that must accompany these multiplexers cause the primary cost of handling this traffic and are properly recovered in flat rates instead of mileage sensitive rates.” *Id.* *But see* AT&T Apr. 1A *Ex Parte* Letter at 2.

106. We find that AT&T has provided insufficient evidence to support its argument that the economies of scale and required electronics for interoffice transport and entrance facilities must be comparable because the facilities have similar calling volumes. This falls far short of establishing any TELRIC error in Qwest's entrance facility rate based on an analysis of costs. Based on this record, we find that Qwest presents a reasonable response to AT&T's claim that there is no cost or engineering difference between entrance facility trunks and interoffice transport trunks to justify different rates.

107. We also find that Qwest presents a reasonable response to AT&T's criticism of Qwest's entrance facility rate structure. Qwest states that its structure reflects the way costs are incurred because the dominant cost driver for entrance facilities (which tend to be short) are central office electronics that "do not vary significantly with distance;" thus, Qwest asserts, non-distance sensitive rates here are appropriate.³⁷³ Furthermore, according to Qwest, the significant cost driver for interoffice facilities which tend to be substantially longer is outside plant that is distance sensitive; thus, Qwest asserts that distance sensitive rates in the case of interoffice transport are proper.³⁷⁴ Qwest also notes that New Mexico, Oregon and South Dakota are among several states that allow entrance facilities to have a separate rate that is not distance sensitive,³⁷⁵ and that other states have adopted the rate structure with a distance sensitive element that AT&T supports.³⁷⁶ As we explained above, our rules permit entrance facilities to have a distance sensitive component but do not require it,³⁷⁷ and we generally defer to the states on UNE pricing issues unless we conclude that the state has made a clear error in applying our TELRIC rules.³⁷⁸

108. We find that AT&T has not provided any evidence that any state commission committed clear TELRIC error on the issue of entrance facility pricing, and accordingly, we defer to the states. Furthermore, AT&T's ongoing disagreement with Qwest over whether entrance facilities are the same as interoffice facilities is precisely the kind of complex, technical and fact-intensive dispute that the Commission has stated it does not have the time or resources to resolve during its 90-day statutory review period.³⁷⁹ AT&T has the opportunity to bring its

³⁷³ Qwest Feb. 14B *Ex Parte* Letter, first attachment at 2. Entrance facilities average 2-3 miles, according to Qwest, and central office electronics account on average for 73% of DS1 entrance facility costs and 80% for DS3. *Id.*

³⁷⁴ Qwest Feb. 14B *Ex Parte* Letter, first attachment at 2. Interoffice transport facilities average 10-20 miles, according to Qwest, and outside plant accounts on average for 55-90% of a DS1 and DS3 facility costs (depending on distance and circuit capacity). Qwest Thompson/Freeberg Reply Decl., paras. 8-9.

³⁷⁵ Qwest Feb. 14B *Ex Parte* Letter, first attachment at 1 and Thompson Colorado Pricing Decl. Attach. at 1-3.

³⁷⁶ *Id.* E.g., Colorado, Utah and Massachusetts have entrance facilities that are based on a flat-rate distance sensitive element. Qwest Feb. 14B *Ex Parte* Letter, Thompson Colorado Pricing Decl. Attach. at 1-3.

³⁷⁷ 47 C.F.R. §§ 51.507 (b) and (c); see para. 101, *supra*.

³⁷⁸ E.g., *Qwest 9-State Order*, 17 FCC Rcd at 26498, para. 352.

³⁷⁹ E.g., *SWBT Texas Order*, 15 FCC Rcd at 18375, para. 51; *BellSouth Multistate Order*, 17 FCC Rcd at 17643, para. 97.

proposal and the underlying engineering and cost model assumptions before the three state commissions in present cost proceedings, and the state commissions have demonstrated a willingness to give this full consideration. In light of no party having raised this issue in prior state cost proceedings, AT&T's unsupported assertions and Qwest's reasonable explanation of why entrance facilities may have a different rate and rate structure than interoffice transport, we find that AT&T has failed to persuasively rebut Qwest's *prima facie* showing of TELRIC compliance.

D. Checklist Item 7 – 911/E911 Access & Directory Assistance/Operator Svcs.

1. 911 and E911 Access

109. Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide “[n]on discriminatory access to 911 and E911 services.”³⁸⁰ A BOC must provide competitors with access to its 911 and E911 services in the same manner that it provides such access to itself, *i.e.*, at parity.³⁸¹ Specifically, the BOC “must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers.”³⁸² We find, as did the state commissions,³⁸³ that Qwest provides nondiscriminatory access to 911 and E911 services.³⁸⁴ We reject WorldCom’s generalized assertion that Qwest missed regional performance metrics with respect to its trouble rate for E911 (MR-8). WorldCom claims that Qwest repeatedly missed statistical parity for E911 trunk trouble rates.³⁸⁵ In reply, Qwest states that its trouble rate for 911/E911 was zero for New Mexico and South Dakota, and at parity for Oregon.³⁸⁶ We have reviewed the E911 performance metric categories WorldCom addresses for each of the application states and find that the record does not reflect a systemic problem because Qwest satisfies the PID for all three states.

2. Directory Assistance / Operator Services

110. Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require a BOC to provide nondiscriminatory access to “directory assistance services to allow the other carrier’s

³⁸⁰ 47 U.S.C. § 271(c)(2)(B)(vii).

³⁸¹ *Bell Atlantic New York Order*, 15 FCC Rcd at 4130-31, para. 349 (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256).

³⁸² *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256.

³⁸³ New Mexico Commission Comments at 31; Oregon Commission Comments at 13; South Dakota Commission Comments at 5.

³⁸⁴ See Qwest Application at 84; see also Qwest Application App. A, Tab 17, Declaration of Margaret S. Bumgarner, paras. 45-54.

³⁸⁵ See WorldCom Comments at 18, App. Declaration of Sherry Lichtenberg, para. 32.

³⁸⁶ See Qwest Reply at 44.

customers to obtain telephone numbers” and “operator call completion services,” respectively.³⁸⁷ Additionally, section 251(b)(3) of the 1996 Act imposes on each LEC “the duty to permit all [competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays.”³⁸⁸ Based on our review of the record, we conclude, as did each of the state commissions,³⁸⁹ that Qwest offers nondiscriminatory access to its directory assistance services and operator services (OS/DA).³⁹⁰ We note that no commenter challenges Qwest’s compliance with this part of checklist item 7.

E. Remaining Checklist Items

111. In addition to showing compliance with the statutory requirements discussed above, an applicant for section 271 authority must demonstrate that it complies with checklist item 3 (poles, ducts, and conduits),³⁹¹ item 6 (unbundled local switching),³⁹² item 8 (white pages),³⁹³ item 9 (numbering administration),³⁹⁴ item 10 (data bases and signaling),³⁹⁵ item 11 (number portability),³⁹⁶ item 12 (local dialing parity),³⁹⁷ item 13 (reciprocal compensation),³⁹⁸ and item 14 (resale).³⁹⁹ Based on the evidence in this record, we conclude, as did each of the state

³⁸⁷ 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III). *See also Bell Atlantic New York Order*, 15 FCC Rcd at 4131, para. 351.

³⁸⁸ 47 U.S.C. § 251(b)(3). We have previously held that a BOC must be in compliance with section 251(b)(3) in order to satisfy sections 271(c)(2)(B)(vii)(II) and (III). *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20740 n.763. *See also Bell Atlantic New York Order*, 15 FCC Rcd at 4132-33, para. 352.

³⁸⁹ New Mexico Commission Comments at 31; Oregon Commission Comments at 13; South Dakota Commission Comments at 5.

³⁹⁰ *See Qwest Application* at 86-87. *See also Qwest Application App. A, Tab 18, Declaration of Lori A. Simpson*, paras. 59-66.

³⁹¹ 47 C.F.R. § 271(c)(2)(B)(iii).

³⁹² 47 C.F.R. § 271(c)(2)(B)(vi).

³⁹³ 47 C.F.R. § 271(c)(2)(B)(viii).

³⁹⁴ 47 C.F.R. § 271(c)(2)(B)(ix).

³⁹⁵ 47 C.F.R. § 271(c)(2)(B)(x).

³⁹⁶ 47 C.F.R. § 271(c)(2)(B)(xi).

³⁹⁷ 47 C.F.R. § 271(c)(2)(B)(xii).

³⁹⁸ 47 C.F.R. § 271(c)(2)(B)(xiii).

³⁹⁹ 47 C.F.R. § 271(c)(2)(B)(xiv).

commissions, that Qwest complies with the requirements of all of these checklist items.⁴⁰⁰ None of the commenting parties challenge Qwest's compliance with these items.

V. SECTION 272 COMPLIANCE

112. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."⁴⁰¹ The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.⁴⁰² Together, these safeguards discourage, and facilitate the detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.⁴⁰³ In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.⁴⁰⁴ As the Commission stated in prior section 271 orders, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.⁴⁰⁵

113. Based on the record, we conclude that Qwest Corporation (QC) and Qwest LD Corp. (QLDC), its section 272 affiliate, have demonstrated compliance with the requirements of section 272.⁴⁰⁶ Further, as discussed below, we conclude that we need not address issues related

⁴⁰⁰ New Mexico Commission Comments at 31 and 50-51; Oregon Commission Comments at 12-15; and South Dakota Commission Comments at 5.

⁴⁰¹ 47 U.S.C. § 271(d)(3)(B); see also Appendix K.

⁴⁰² See *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order on Reconsideration, 15 FCC Rcd 1161 (2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999).

⁴⁰³ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, para. 15; *Accounting Safeguards Order*, 11 FCC Rcd at 17550, para. 24; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

⁴⁰⁴ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

⁴⁰⁵ *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346; see *SWBT Texas Order*, 15 FCC Rcd at 18549, para. 395.

⁴⁰⁶ QLDC is a switchless reseller which is a wholly-owned subsidiary of Qwest Services Corporation, which in turn, is a wholly owned subsidiary of QCH. QLDC was formed in the face of a number of accounting difficulties which prevented Qwest from certifying whether certain of its financial statements were in compliance with GAAP. *Qwest 9-State Order* at paras. 382-383. As we noted in approving Qwest's previous application, the *Qwest 9-State Order*, the Commission has allowed BOCs considerable flexibility in how they structure their section 272 affiliates. *Id.* at para. 386.

to the possible provisioning of in-region, interLATA services through Qwest Communications Corporation (QCC) because Qwest has not made an affirmative showing to certify QCC's financial statements pursuant to section 272(b)(2).⁴⁰⁷

114. In the *Qwest 9-State Order*, the Commission noted that its judgment about Qwest's compliance with section 272 is a predictive one, as required by section 271(d)(3)(B) of the Act.⁴⁰⁸ Specifically, our task is to determine whether Qwest's section 272 affiliate, QLDC, will be complying with this requirement on the date of authorization, and thereafter.⁴⁰⁹ We focus our discussion on those areas where commenters challenge Qwest's compliance with these requirements.

115. We conclude that Qwest has adequately demonstrated that QLDC will be the entity providing in-region, interLATA service originating in the three states that are the subject of this application.⁴¹⁰ We reject the argument that the application, as filed by QC, poses significant freeze frame issues.⁴¹¹ The sole objection regarding Qwest's compliance with its section 272

⁴⁰⁷ The New Mexico Commission and the South Dakota Commission declined to make a recommendation regarding Qwest's compliance with section 272. New Mexico Commission Comments at 58-60; South Dakota Commission Comments at 7. The Oregon Commission found Qwest to be in compliance with these obligations. Oregon Commission Comments at 16-17.

⁴⁰⁸ Several courts have addressed the Commission's discretion to make predictive judgments. In different contexts, the United States Supreme Court has recognized that the Commission must necessarily make difficult predictive judgments in order to implement certain provisions of the Communications Act. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981) (recognizing that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations) (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978)); *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) ("greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions"); see also *Pub. Util. Comm'n of State of Cal. v. F.E.R.C.*, 24 F.3d 275, 281 (D.C. Cir. 1994) (acknowledging that predictions regarding the actions of regulated entities are the type of judgments that courts routinely leave to administrative agencies). Indeed, we note that determining whether a BOC's section 271 application meets the requirements of the competitive checklist, the requirements of section 272, and is consistent with the public interest, convenience and necessity requires the Commission to engage in highly complex, fact-intensive analyses. See 47 U.S.C. § 271(d)(3).

⁴⁰⁹ Qwest Application at 153-163. See also *Qwest 9-State Order*, paras. 393-418. In the *Qwest 9-State Order*, we approved Qwest's compliance with the section 272 affiliate safeguards. In particular, as in the instant case, we approved Qwest's use of QLDC as its section 272 affiliate. *Id.*

⁴¹⁰ Cf. *AT&T Corp. v. U.S. West Corp.*, 13 FCC Rcd 21438 at 21465-66, para. 37 ("*Qwest Teaming Order*"), *aff'd sub nom. U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000). In the *Qwest Teaming Order*, the Commission considered the totality of the circumstances, rather than focusing on any one particular activity, in assessing whether the BOC was providing interLATA service within the meaning of section 271. *Id.* In making its determination, the Commission considered several factors, including whether the BOC was effectively holding itself out as a provider of long distance service, and whether the BOC was performing activities and functions that were typically performed by those who are legally or contractually responsible for providing interLATA service to the public. *Id.* Similarly, we consider, for purposes of this section 271 application, the totality of the circumstances in determining whether QLDC is the entity that will be providing originating in-region, interLATA service.

⁴¹¹ Touch America Comments at 2-4.

obligations was filed by Touch America based on Qwest's stated intent to eventually designate QCC as an active section 272 affiliate and to potentially do so during the pendency of this application.⁴¹² Qwest provides support for its assertion that QLDC complies with the requirements set forth in section 272. Qwest states, however, that it intends to eventually designate QCC as its active section 272 affiliate and to begin providing in-region interLATA services on a facilities basis through QCC. Qwest states that it intends to do this as soon as it is able to certify QCC's financial statements. Qwest stated that if this occurred during the pendency of this application, Qwest would file additional information regarding compliance with section 272(b)(2). Qwest provided no such information in the record. Thus, we need only address the application as filed. Given that we have previously approved an application by Qwest using QLDC as its 272 application, it is clear that QLDC can serve as the 272 affiliate here. In the event that Qwest does "merge" QLDC with another entity in the future, Qwest must, of course, comply with all of the Commission's rules.

VI. PUBLIC INTEREST ANALYSIS

116. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.⁴¹³ At the same time, section 271(d)(4) of the Act states that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."⁴¹⁴ Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

117. We conclude that approval of this application is consistent with the public interest.⁴¹⁵ From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in the application states' local exchange markets have been removed, and that these local exchange markets are open to competition. We find further that the record confirms the Commission's view that BOC entry into the long distance market will benefit consumers and competition if the

⁴¹² Touch America Comments at 2-4. Touch America argues that Qwest's application violates the Commission's "complete-as-filed" rule. Touch America's argument is not relevant given that we find section 272 compliance with regard to QLDC only and therefore need not address Qwest's showing with regard to QCC.

⁴¹³ 47 U.S.C. § 271(d)(3)(C); Appendix F at paras. 70-71.

⁴¹⁴ 47 U.S.C. § 271(d)(4).

⁴¹⁵ We note that Sprint makes a vague reference to "price squeeze" but has not stated a specific claim supported by pricing or other evidence in order to establish such a violation. Sprint Comments at 3.

relevant local exchange market is open to competition consistent with the competitive checklist.⁴¹⁶

118. We disagree with Sprint's assertions that we must, under our public interest standard, consider a variety of other factors as evidence that the local market is not yet truly open to competition, despite checklist compliance.⁴¹⁷ For example, Sprint argues that low levels of entry in the application states indicate that the application is not in the public interest.⁴¹⁸ We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.⁴¹⁹ Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the failure of any number of companies to enter the market in and of themselves do not necessarily undermine that showing. As the Commission has stated in previous section 271 orders, factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.⁴²⁰

A. Assurance of Future Compliance

119. As set forth below, we find that the performance assurance plans (PAP) that will be in place in the three states provide assurance that the local market will remain open after Qwest receives section 271 authorization in these states. We find that these plans fall within a zone of reasonableness and are likely to provide incentives that are sufficient to foster post-entry checklist compliance. In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market.⁴²¹ Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission has stated previously that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.⁴²² The three state PAPs, in combination with the respective commission's active oversight of its

⁴¹⁶ See *SWBT Texas Order*, 15 FCC Rcd at 18558-89, para. 419.

⁴¹⁷ Those factors include the level of competitive LEC market share, the financial strength of competitive LECs, and the failure of other BOCs to enter the market in the application states. Sprint Comments at 4-11.

⁴¹⁸ Sprint Comments at 9-10.

⁴¹⁹ See, e.g., *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77; *Sprint v. FCC*, 274 F.3d at 553-54.

⁴²⁰ See *Verizon Pennsylvania Order*, 16 FCC Rcd 17487, para. 126.

⁴²¹ See, e.g., *Verizon Pennsylvania Order*, 16 FCC Rcd at 17487-88, para. 127.

⁴²² *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 393-398. We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market. These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6).

PAP, and these commissions' stated intent to undertake comprehensive reviews to determine whether modifications are necessary, provide additional assurance that the local market in the three application states will remain open.⁴²³

120. The PAPs submitted here are modeled after the Texas plan and closely resemble the PAPs the Commission reviewed in the recently approved *Qwest 9-State Order*.⁴²⁴ The New Mexico, Oregon and South Dakota PAPs were developed in a multi-state review process that began with the SBC Texas PAP.⁴²⁵ Following the multi-state review process, the state commissions in each of these states separately received comment from parties and held either hearings or oral arguments on their PAPs.⁴²⁶ We note that the three state commissions have approved the PAPs proposed in their states, which will go into effect with approval of this application. The PAPs are similar in all relevant respects to those in the recently approved *Qwest 9-State Order*.⁴²⁷

121. We conclude that the three application states' respective PAPs provide incentives to foster post-entry checklist compliance. As in prior section 271 orders, our conclusions are based on a review of several key elements in the performance remedy plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.⁴²⁸ The structure of these plans is similar to tiered plans that the

⁴²³ New Mexico Commission Final Order at 26-34; Oregon Commission Comments at 16; Oregon Workshop 4, Part 2 Report at 58-93; South Dakota Commission Reply at 3-4; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 at 1-2 (filed February 21A 2003) (Qwest Feb. 21A *Ex Parte* Letter). The South Dakota Commission has reached an agreement with Qwest and does not find fault with the new Qwest South Dakota PAP. Qwest Reply at 52-53; South Dakota Commission Reply at 3-4; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11, Attach. 2, (filed February 26D 2003) (Qwest Feb. 26D *Ex Parte* Letter). Qwest Application, App. E, Tab 1, South Dakota Performance Assurance Plan at 18-21 (New Mexico PAP); Qwest Application, App. E, Tab 2, Oregon Performance Assurance Plan at 18-21 (Oregon PAP), Qwest Application, App. E, Tab 3, South Dakota Performance Assurance Plan at 19-21 (South Dakota PAP).

⁴²⁴ Qwest Application at 169; *SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; *Qwest 9-State Order*, 17 FCC Rcd at 26546-48, para. 442.

⁴²⁵ Qwest Application App. A, Tab 30, Declaration of Mark S. Reynolds on the New Mexico Performance Assurance Plan (Qwest Reynolds-New Mexico PAP Decl.) at paras. 4-7; Qwest Application App. A, Tab 31, Declaration of Mark S. Reynolds on the Oregon Performance Assurance Plan (Qwest Reynolds-Oregon PAP Decl.) at paras. 4-6; Qwest Application App. A, Tab 32, Declaration of Mark S. Reynolds on the South Dakota Performance Assurance Plan (Qwest Reynolds-South Dakota PAP Decl.) at paras. 4-6.

⁴²⁶ Qwest Reynolds-New Mexico PAP Decl., para. 6; Qwest Reynolds-Oregon PAP Decl., para. 5; Qwest Reynolds-South Dakota PAP Decl., para. 5.

⁴²⁷ Qwest Application at 169-173; Qwest Reply at 52-53.

⁴²⁸ See, e.g., *Qwest 9-State Order*, 17 FCC Rcd. at 26546-48, para. 442.

Commission recently approved in the *Qwest 9-State Order*.⁴²⁹ The PAPs vary in the amount at risk, but are in line with those the Commission has previously considered.⁴³⁰ The PAPs include provisions for continuing review of the PAP by the state commission.⁴³¹ We also note that the PAPs include provisions for audits and provisions that impose penalties on Qwest for submitting incomplete or revised reports and/or reports found to require revision.⁴³²

122. As the Commission has stated in prior orders, the PAP is not the only means of ensuring that a BOC continues to provide nondiscriminatory service to competing carriers.⁴³³ In addition to the monetary payments at stake under each plan, we believe Qwest faces other consequences if it fails to sustain an acceptable level of service to competing carriers, including enforcement provisions in interconnection agreements, federal enforcement action pursuant to section 271(d)(6), and remedies associated with antitrust and other legal actions.

123. We disagree with AT&T's contention that the South Dakota PAP will not deter backsliding. The South Dakota Commission has approved the recently revised Qwest South Dakota PAP, thus removing the basis for AT&T's criticisms.⁴³⁴ No other commenter has voiced concerns about the PAPs in this application. As noted above, the PAPs are similar in all relevant respects to the PAPs in the recently approved *Qwest 9-State Order*.

B. Unfiled Interconnection Agreements

124. We find that Qwest's previous failure to file certain interconnection agreements with the application states does not warrant a denial of this application. We conclude, as in the *Qwest 9-State Order*, that concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the commissions of the application states pursuant to section 252 and by each state acting on Qwest's submission of

⁴²⁹ *Qwest 9-State Order*, 17 FCC Rcd at 26546-48, para. 442; Qwest Application at 170-173; Qwest Reply at 52-53; Qwest Reynolds-New Mexico PAP Decl., paras. 9, 20-24; Qwest Reynolds-Oregon PAP Decl., paras. 8, 19-23; Qwest Reynolds-South Dakota PAP Decl., paras. 8, 22-26; Qwest Feb. 26D *Ex Parte* Letter, Attach. 2.

⁴³⁰ The New Mexico cap is set at 44 percent of ARMIS Net Return; the Oregon cap is set at 36 percent (and may be increased to a maximum cap of 44 percent or decreased to 30 percent upon a specific Oregon Commission finding); the South Dakota cap is set at 36 percent (subject to increase or decrease in specified circumstances). Qwest Application at 171-172; New Mexico PAP section 12; Oregon PAP section 12; South Dakota PAP section 12.; Qwest Feb. 26D *Ex Parte* Letter, Attach. 2, section 12.

⁴³¹ New Mexico PAP section 16; Oregon PAP section 16; South Dakota PAP section 16; Qwest Feb. 26D *Ex Parte* Letter, Attach. 2, section 16.

⁴³² New Mexico PAP sections 14-15; Oregon PAP sections 14-15; South Dakota PAP sections 14-15; Qwest Feb. 26D *Ex Parte* Letter, Attach. 2, sections 14-15.

⁴³³ See *Bell Atlantic New York Order*, 15 FCC Rcd at 4165, para. 430; *SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; *Verizon Pennsylvania Order* 16 FCC Rcd at 17489, para. 130.

⁴³⁴ Qwest Reply at 52-53; Qwest Mar. 21A *Ex Parte* Letter at 1-2; South Dakota Commission Reply at 3-4; AT&T Comments at 37-42.

those agreements.⁴³⁵ Although this record does not demonstrate ongoing discrimination, parties remain free to present other evidence of ongoing discrimination, for example, through state commission enforcement processes or to this Commission in the context of a section 208 complaint proceeding.⁴³⁶ Further, to the extent any past discrimination existed, we anticipate that any violations of the statute or our rules will be addressed expeditiously through federal and state complaint and investigation proceedings.⁴³⁷

1. Background

125. *Declaratory Order*. On October 4, 2002, the Commission released a memorandum opinion and order granting in part and denying in part Qwest's petition for declaratory ruling on which types of negotiated contractual arrangements between the incumbent LECs and competitive LECs are subject to mandatory filing and state commission requirements of section 252(a)(1).⁴³⁸ In the *Declaratory Order*, we found that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).⁴³⁹ We also found that, unless the information is generally available to carriers, agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements.⁴⁴⁰ Further, we stated our belief that the state commissions should be responsible for applying, in the first instance, the statutory interpretation set forth in the *Declaratory Order*.⁴⁴¹

⁴³⁵ See *Qwest 9-State Order*, 17 FCC Rcd at 26553-77, paras. 453-486.

⁴³⁶ *Id.* at 26554, para. 454.

⁴³⁷ *Id.*

⁴³⁸ *Qwest 9-State Order*, 17 FCC Rcd at 26558, para. 459, citing *Qwest Communications International, Inc. Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, Memorandum Opinion and Order, WC Docket No. 02-89, 17 FCC Rcd 19337 (October 4, 2002) (*Declaratory Order*); *Qwest 9-State Order*, 17 FCC Rcd at 26555, para. 456, citing *Petition for Declaratory Ruling of Qwest Communications International Inc.*, WC Docket No. 02-89 at 3 (2002) (*Qwest Section 252 Petition*). We stated, in the *Declaratory Order*, the types of contractual arrangements that need not be filed: (1) settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251; (2) forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement; and (3) agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the terms and conditions of the underlying interconnection agreement. See *Qwest 9-State Order*, 17 FCC Rcd at 26558, para. 459; *Declaratory Order*, 17 FCC Rcd at 19341-43, paras. 9-14.

⁴³⁹ *Declaratory Order*, 17 FCC Rcd at 19341, para. 8.

⁴⁴⁰ *Declaratory Order*, 17 FCC Rcd at 19341, para. 9.

⁴⁴¹ *Declaratory Order*, 17 FCC Rcd at 19340, para. 7.

126. *January 2003 Filings.* In applying the declaratory ruling, we found in the *Qwest 9-State Order* that a Qwest/Allegiance Internetwork Calling Name Delivery Service Agreement did not appear, on its face, to fall within the scope of the filing requirement exceptions set forth in the Commission's declaratory ruling, and accordingly, it likely should have been filed with the states.⁴⁴² Pursuant to our determination on this issue, Qwest has filed similar contracts in January with the application states for approval under section 252.⁴⁴³ Qwest filed three contracts in New Mexico on January 9 and January 10, 2003, and filed three contracts in Oregon on January 9, 2003.⁴⁴⁴ Qwest filed eight such contracts in South Dakota on January 13, 2003.⁴⁴⁵

127. *State Proceedings.* The status of each proceeding in the application states regarding the issue of unfiled agreements is detailed below.⁴⁴⁶ The application states did not find that concerns with the unfiled agreements render Qwest's section 271 application contrary to the public interest. In fact, each of those application states recommends approval of Qwest's section 271 application.⁴⁴⁷ We address each state's specific proceedings on this matter in the following paragraphs.

128. *New Mexico.* The New Mexico Commission issued an *Order Initiating Investigation* on March 19, 2002, directing Qwest "to produce, *inter alia*, copies of all unfiled agreements, contracts, letters, amendments, provisions or other understandings with any CLEC currently or formerly certified in New Mexico."⁴⁴⁸ On June 18, 2002, the New Mexico

⁴⁴² See *Qwest 9-State Order*, 17 FCC Rcd at 26571-72, para. 478 n.1746; Qwest Application at 175; *Declaratory Order*, 17 FCC Rcd at 19343, para. 13.

⁴⁴³ Qwest Application at 176.

⁴⁴⁴ See Letter from R. Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 at 1-2 (filed February 26, 2003) (Qwest Feb. 26B *Ex Parte* Letter); Letter from R. Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 at 1 (filed March 28, 2003) (Qwest Mar. 28A Unfiled Agreements *Ex Parte* Letter).

⁴⁴⁵ See Qwest Feb. 26B *Ex Parte* Letter at 2; Qwest Mar. 28A Unfiled Agreements *Ex Parte* Letter at 2; Letter from Dan Poole, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 03-11 at 1 (filed April 8, 2002) (Qwest Apr. 8D *Ex Parte* Letter).

⁴⁴⁶ Qwest states that in September 2002, it filed agreements with the application states that contain provisions creating ongoing obligations that relate to section 251(b) or (c) which have not been terminated or superseded by agreement, commission order or otherwise. See Qwest Application at 175. Qwest also states that it filed contracts in January 2003 with the application states that are similar to the Qwest/Allegiance Internetwork Calling Name Delivery Service Agreement. See Qwest Application at 175-76; Qwest Apr. 8D *Ex Parte* Letter at 1; *Qwest 9-State Order*, 17 FCC Rcd at 26571-72, para. 478 n.1746.

⁴⁴⁷ New Mexico Commission Comments at 1, 63; Oregon Commission Comments at 17; South Dakota Commission Reply at 4.

⁴⁴⁸ Qwest Application, App. N, Vol. 3, Tab 2, *Investigation Into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers*, Utility Case No. 3750, Order Initiating Investigation and Appointing Hearing, 4-5 (New Mexico Commission 2002)(*Order Initiating Investigation*); Qwest Application App. C, Vol. 1, Tab 19, *Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section* (continued....)

Commission held a hearing, and the state Attorney General moved for sanctions to be imposed on Qwest for its failure to respond completely to discovery requests.⁴⁴⁹ On October 8, 2002, the New Mexico Commission released an order finding that Qwest violated the filing requirements of the Act and the state commission's rules.⁴⁵⁰ Further, the state commission found sufficient cause to initiate a separate proceeding for the imposition of fines for these violations.⁴⁵¹ However, "given the lack of any compelling showing by any party," the New Mexico Commission did not find that the unfiled agreements at issue "had the effect of significantly frustrating Congress' intent that the local markets be open to competition."⁴⁵²

129. During the investigation, the New Mexico Commission staff requested that the state commission take administrative notice of Qwest's September 9, 2002 filing of five agreements that, according to the state commission, appear to fall into the category of documents that Qwest was ordered to produce in response to the *Order Initiating Investigation*.⁴⁵³ The New Mexico Commission reviewed the five agreements, approved four by operation of law on December 8, 2002, and "dismissed the fifth because it referenced other agreements that had not

(Continued from previous page)

271 Process, and Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996; Consideration of Costing and Pricing Rules for OSS, Collocation, Shared Transport, Non-Recurring Charges, Spot Frames, Combination of Network Elements and Switching; Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers, Final Order Regarding Compliance with Outstanding 271 Requirements: SGAT Compliance, Track A, and Public Interest, Utility Case Nos. 3269 and 3537, 3495, and 3750, 112-14 (New Mexico Commission 2002) (New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271).

⁴⁴⁹ See *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* at 115.

⁴⁵⁰ See *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* at 145-46. In this order, the New Mexico Commission adopted the definition of "an interconnection agreement" or 'agreement' as used in 47 U.S.C. §§ 251(c) and 152(a) and 17 NMAC 11.18.17 [] to include, at a minimum, a negotiated or arbitrated contractual arrangement between an incumbent LEC and a [competitive] LEC that is binding; relates to interconnection, services, or network elements pursuant to 47 U.S.C. §§ 251(b) and (c); or defines or affects the prospective interconnection relationship between two LECs. This definition also includes any agreement modifying or amending any part of an existing interconnection agreement." *Id.* at 129. The New Mexico Commission reviewed 53 agreements. See *id.* at 130. The state commission found that agreements between Qwest and competitive LECs, including e.spire, McLeod, Eschelon, and GST Telecom, should be further investigated in a separate proceeding for compliance with the Act and the state commission rules, and possible imposition of fines. See *id.* at 144-45.

⁴⁵¹ See *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* at 144-45.

⁴⁵² See *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* at 144-45.

⁴⁵³ See *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* at 115; Qwest Application, App. N, Vol. 3, Tab 166, *Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers*, UT Case No. 3750, Staff Notice and Request for the Commission to Take Administrative Notice of NMPRC Case 3814 in this Investigation (New Mexico Commission 2002).

been supplied.”⁴⁵⁴ The state commission also reviewed three contracts filed by Qwest on January 9 and January 10, 2003, and has approved those contracts.⁴⁵⁵

130. *Oregon.* The Oregon Commission, in its final report in Qwest’s state section 271 proceeding dated August 19, 2002, recommended approval of Qwest’s section 271 application, but reserved the right to re-examine the unfiled agreements issue at a later date.⁴⁵⁶ The Oregon Commission reviewed sixteen agreements that Qwest filed on September 4, 2002, and approved those agreements by orders on November 15, 2002.⁴⁵⁷ The state commission also reviewed the three contracts Qwest filed on January 9, 2003, and has approved those contracts.⁴⁵⁸

131. *South Dakota.* On November 22, 2002, the South Dakota Commission released its Public Interest Order addressing Qwest’s compliance with section 271.⁴⁵⁹ The state commission provided that the unfiled agreements issue would be handled in a separate proceeding, and found that Qwest’s conduct “had not resulted in closed markets in South Dakota.”⁴⁶⁰ The South Dakota Commission reviewed four agreements filed by Qwest on

⁴⁵⁴ See Qwest Application at 175. The New Mexico Commission found that Qwest failed to supply eight interconnection agreements for which Qwest sought termination, and dismissed Qwest’s “Termination Agreement” with Eschelon dated May 1, 2002. See the *Filing and Requested Approval of Five Negotiated Agreements Between Qwest Corporation and COVAD Communications Co., Eschelon TeleCom, Inc., and McLeodUSA, Certified Local Exchange Carriers (CLEC)*, UT Case No. 3814, Order of Dismissal (New Mexico Commission 2002).

⁴⁵⁵ See Qwest Feb. 26B *Ex Parte* Letter at 1; Qwest Mar. 28A Unfiled Agreements *Ex Parte* Letter at 1; Qwest Apr. 8D *Ex Parte* Letter at 1.

⁴⁵⁶ Qwest Application, App. C, Vol. 1, Tab 14, *Investigation into the Entry of Qwest Corporation, formerly known as US West Communications, Inc. into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, Final Recommendation Report of the Commission: Affirmative Recommendation, Docket UM 823, 18-19, 20 (Oregon Commission 2002) (*Oregon Commission Final Recommendation Report*).

⁴⁵⁷ See Qwest Application at 175; Qwest Application, App. P, Vol 2, Tab 13, Orders regarding Amendments to Interconnection Agreements Approved. The Oregon Commission did not consider Qwest’s filings acceptable until October 3, 2002, the date that Qwest complied with the state commission’s service requirements by providing complete proof of service materials. See Qwest Application, App. P, Vol 2, Tab 13, Orders regarding Amendments to Interconnection Agreements Approved, e.g., *Ernest Communications, Inc. and Qwest Corporation, Third Amendment to Interconnection Agreement, Submitted for Commission Approval Pursuant to Section 252(e) of the Telecommunications Act of 1996*, Order No. 02-806, Amendment Approved, 1 n.1 (Oregon Commission 2002).

⁴⁵⁸ See Qwest Feb. 26b *Ex Parte* Letter at 2; Qwest Apr. 8D *Ex Parte* Letter at 1. See also Qwest Application at 175-76.

⁴⁵⁹ Qwest Application, App. C, Vol. 1, Tab 9, *Analysis of Qwest Corporation’s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Docket TC01-165, Order Regarding Public Interest (South Dakota Commission 2002) (*South Dakota Commission Public Interest Order*).

⁴⁶⁰ See South Dakota Commission Comments at 8; *South Dakota Commission Public Interest Order* at 3; South Dakota Commission Reply at 4; Qwest Application Toll-State 271 Proceeding Overview Decl., para. 45.

September 24, 2002, and approved those agreements in a meeting held on December 19, 2002.⁴⁶¹ The state commission also approved eight contracts that Qwest filed on January 13, 2003.⁴⁶²

2. Discussion

132. As we discussed in the *Qwest 9-State Order*, while we are troubled by Qwest's previous failure to file certain agreements with the states, we find that this previous failure does not warrant a denial of this application.⁴⁶³ We conclude that concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the commissions of the application states pursuant to section 252 and by each state acting on Qwest's submission of those agreements.⁴⁶⁴ The possibility of noncompliance with section 252 on a going-forward basis, therefore, was eliminated by each state commission's approval or rejection of those agreements. In addition, we find that commenters have provided no evidence that the records developed by the state commissions are wanting because certain competitive LECs did not participate. We also find that no commenter offered persuasive evidence that the KPMG OSS test data were compromised as a result of unfiled agreements. We address these conclusions below.

133. Based on the record, we reject AT&T's argument that concerns with Qwest's unfiled interconnection agreements in the application states require a denial of Qwest's section 271 application based on checklist compliance (nondiscrimination obligations) or the public interest.⁴⁶⁵ First, AT&T contends that the record in New Mexico reflects the significant state commission concern that Qwest's practice of entering secret deals has not been cured completely by its new practice of terminating longstanding discriminatory deals, because additional secret agreements may still exist.⁴⁶⁶ Second, AT&T maintains, that unlike the previous application, this application involves a state where express findings have been made that Qwest knowingly and intentionally engaged in discriminatory behavior.⁴⁶⁷

⁴⁶¹ See Qwest Application at 175.

⁴⁶² See Qwest Feb. 26B *Ex Parte* Letter at 2; Qwest Mar. 28A Unfiled Agreements *Ex Parte* Letter at 2; Qwest Apr. 8D *Ex Parte* Letter at 1.

⁴⁶³ See *Qwest 9-State Order*, 17 FCC Rcd at 26567-75, paras. 473-481.

⁴⁶⁴ *Id.* at 26567, para. 473.

⁴⁶⁵ *Id.* at 26567, para. 473.

⁴⁶⁶ See AT&T Comments at 35. AT&T states that the New Mexico Commission's findings regarding the discovery process were made in August 2002, after Qwest adopted its new filing policy in May 2002. See *id.*; *Qwest 9-State Order*, 17 FCC Rcd at 26555, para. 456. Touch America supports this contention in its reply comments. See Touch America Reply at 6-7.

⁴⁶⁷ See AT&T Comments at 5.

134. Qwest replies that there are no additional unfiled agreements that should be filed with the New Mexico Commission.⁴⁶⁸ We note that the New Mexico Commission ultimately found that the unfiled agreements issue does not warrant a denial of Qwest's section 271 application, and that any past noncompliance with section 252 should be addressed in a separate enforcement proceeding.⁴⁶⁹

135. We acknowledge the seriousness of AT&T's allegations and the impact that agreements may have on competition. However, we are persuaded that Qwest's filings with the three state commissions prior to the filing of this section 271 application, coupled with the three application states' disposition of those filed agreements, eliminate the possibility of ongoing discrimination and noncompliance with the filing requirements of section 252.⁴⁷⁰ Furthermore, the state commissions of the three application states, including the New Mexico Commission, held that the concerns raised by unfiled agreements do not warrant denial or delay of Qwest's section 271 application.⁴⁷¹

136. We also reject Touch America's allegation that unfiled agreements undermined the record of the current section 271 proceeding.⁴⁷² In particular, Touch America states that the nonparticipation of certain competitive LECs in the proceeding denied the Commission the benefit of such parties' experience with Qwest in the application states.⁴⁷³ Further, Touch America contends that if Qwest provided preferential terms and conditions to certain of its competitors, that must have affected the OSS performance results relied upon by Qwest to support its application.⁴⁷⁴

⁴⁶⁸ See Qwest Reply at 54-56.

⁴⁶⁹ See Qwest Reply at 55; *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* at 145-146.

⁴⁷⁰ Subsequent to the release of the *New Mexico Commission Final Order Re Compliance with Remaining Aspects of Section 271* issued on October 8, 2002, the New Mexico Commission approved four agreements, rejected one agreement, and reviewed three contracts. See state proceedings under this section, *supra*. There is no evidence in our record that there are unfiled agreements that should be filed with the relevant application states. As we determined in the *Qwest 9-State Order*, Qwest's filing of the agreements with the relevant state commissions eliminated the possibility of ongoing discrimination. See *Qwest 9-State Order*, 17 FCC Rcd at 26568-69, para. 474. Competitive LECs are permitted to opt into agreements that a state commission approved. See *id.* Agreements that are rejected by a state commission also present no discrimination on a going-forward basis because the section 251 provisions are void as to the original parties. See *id.*

⁴⁷¹ In each state proceeding, the application state commissions concluded that concerns with unfiled agreements should be addressed in a separate proceeding or reserved for possible re-examination at a later date. See state proceedings under this section, *supra*.

⁴⁷² Touch America Comments at 7.

⁴⁷³ *Id.* at 7.

⁴⁷⁴ *Id.* at 7.

137. As discussed above, the state commissions did not find the concerns raised by unfiled agreements sufficient to recommend denial of Qwest's application, and Touch America does not present any persuasive evidence of specific harm as a result of the nonparticipation of competitive LECs that may have received preferential treatment from Qwest,⁴⁷⁵ or that the OSS performance results are tainted.⁴⁷⁶ Therefore, we reject Touch America's allegation for the same reasons stated in our *Qwest 9-State Order*.⁴⁷⁷

138. *Complete-as-Filed Rule*. We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules⁴⁷⁸ to the limited extent necessary to consider the three application states' disposition of Qwest's submission of previously unfiled agreements for their review and, if appropriate, approval under section 252(e).⁴⁷⁹ The Commission maintains this procedural requirement to ensure that interested parties have a fair opportunity to comment on the BOC's application, the Attorney General and the state commission can fulfill their statutory consultative roles, and the Commission has adequate time to evaluate the record.⁴⁸⁰ The Commission can waive its procedural rules, however, if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."⁴⁸¹ We conclude, based on the circumstances presented here, that special circumstances warrant a waiver of our rule, and that such waiver will serve the public interest.

139. We conclude that the special circumstances before us here warrant a deviation from the general rules for consideration of late-filed information or developments that take place during the application review period.⁴⁸² In particular, as we discuss below, we find that the

⁴⁷⁵ See *Qwest 9-State Order*, 17 FCC Rcd at 26573, para. 479.

⁴⁷⁶ See *Qwest 9-State Order*, 17 FCC Rcd at 26574, para. 480 (noting that the steering and executive committees of the ROC considered and rejected allegations that OSS data was tainted because the results were based on inputs from competitive LECs that received preferential treatment from Qwest). We note that the New Mexico Commission also reviewed and rejected this allegation. See App. C, Vol. 1, Tab 18, *Order Regarding OSS-Related Matters*, Utility Case No. 3269 & 3537 (New Mexico Commission 2002) (*New Mexico Commission OSS Order*). The Oregon Commission declined to reopen the record to consider Qwest's alleged improprieties, including UNE-P testing. See *Oregon Commission Final Recommendation Report* at 18-19. See also *Qwest 9-State Order*, 17 FCC Rcd at 26574-75, para. 481 (noting the Department of Justice's Qwest 9-state evaluation, and providing that arguably enhanced performance caused by the allegedly preferential treatment will have resulted in a higher benchmark for Qwest to maintain).

⁴⁷⁷ See *Qwest 9-State Order*, 17 FCC Rcd at 26573-75, paras. 479-481.

⁴⁷⁸ 47 C.F.R. § 1.3.

⁴⁷⁹ We refer to the contracts Qwest filed in January 2003, i.e., the *January 2003 Filings*, that are responsive to the *Qwest 9-State Order* determination. See *Qwest 9-State Order*, 17 FCC Rcd at 26571-72, para. 478 n.1746; Qwest Application at 175-76; Qwest Feb. 26B *Ex Parte* Letter; Qwest Mar. 28A Unfiled Agreements *Ex Parte* Letter; Qwest Apr. 8D *Ex Parte* Letter.

⁴⁸⁰ *Qwest 9-State Order*, 17 FCC Rcd at 26575, para. 482.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 26576, para. 483.

interests our normal procedural requirements are designed to protect are not affected by our consideration of the three application states' disposition of Qwest's submission of previously unfiled agreements. In addition, we conclude that consideration of the state dispositions of Qwest's filed agreements will serve the public interest.

140. It is important to note that the Commission has not established a set of factors that must be met in order for the Commission to waive this procedural rule. Indeed, by the very term "special circumstances" it is understood that the facts surrounding new information provided in any given application would be unique. Consequently, it is within our discretion, taking into account any special circumstances, not to afford greater weight to a particular factor used by the Commission in a previous section 271 order.

141. We determine that the state actions with respect to the unfiled agreements are important to consider and are positive ones that will promote competition and serve the public interest by allowing competitors to opt-in to previously unfiled agreements under section 252(i) because the states have approved them as interconnection agreements.⁴⁸³ Furthermore, considering the three states' disposition of Qwest's filing of interconnection agreements places a limited additional analytical burden on commenters and the Commission because the analysis of the interconnection agreements was performed by the state commissions. The concrete and limited nature of the actions taken by each state in either approving or rejecting each interconnection agreement has permitted the Commission staff to evaluate those actions within the 90-day statutory period.⁴⁸⁴ We also find that there has been adequate opportunity for comment on this new information. Indeed, Qwest filed the interconnection agreements with each application state prior to filing the instant section 271 application, giving interested parties ample opportunity to comment on this issue in the instant section 271 proceeding and in the state proceedings.⁴⁸⁵ Because the Commission and commenters have had sufficient time and information to evaluate the impact of these filings on Qwest's application, we see no need to restart the 90-day clock.

142. Additionally, in prior cases we have found cause to grant a waiver of the complete-as-filed rule where the new information is responsive to criticisms in the record, as compared to new information that "consists of additional arguments or information" as to why the applicant should not be required to take further action.⁴⁸⁶ Qwest responded to our determination in the recent *Qwest 9-State Order* concerning the need to file a particular type of contract (as well as criticism from commenters), by taking positive action to file agreements with

⁴⁸³ *Id.* at 26576, para. 485.

⁴⁸⁴ *Id.*

⁴⁸⁵ See Qwest Application at 175-76; Qwest Feb. 26B *Ex Parte* Letter at 1-2; Qwest Mar. 28A Unfiled Agreements *Ex Parte* Letter at 1-2; Qwest Apr. 8D *Ex Parte* Letter at 1.

⁴⁸⁶ *Qwest 9-State Order*, 17 FCC Rcd at 26577, para. 486.

the three application states.⁴⁸⁷ This is very different from the situation in which late-filed material consists of additional arguments or information as to why Qwest should not be required to file these agreements with the state commissions. These factors, as the Commission has found previously, can support grant of a waiver.⁴⁸⁸ For these reasons, we find that the circumstances present in this instance warrant waiver of our procedural requirements, and allow consideration of the disposition of Qwest's previously unfiled agreements by the three application states.

C. Payphone Public Access Lines

143. The Northwest Public Communications Council (NPCC)⁴⁸⁹ contends that Qwest's section 271 application is not in the public interest in Oregon, because Qwest has not complied with its obligations under the *New Services Order*.⁴⁹⁰ Specifically, NPCC argues that Qwest has failed to file rates for pay telephone public access lines (PALs) that comply with the new services test.⁴⁹¹ NPCC contends that, on November 12, 2002, while action on the Qwest nine-state section 271 application was pending, Qwest filed to reduce monthly PAL rates that ranged from \$26.00 to \$30.50 per line to \$8.87 per line, but in January, 2003, withdrew the proposed rates and announced that it would not reduce PAL rates.⁴⁹² NPCC argues that Qwest is "playing fast and loose" with the Commission's *New Services Order* in Oregon, while complying with it in other states.⁴⁹³ NPCC believes that Qwest should comply with the *New Services Order* in Oregon before we grant its section 271 application. Qwest responds that the Commission has already ruled that this issue should not be addressed in a section 271 proceeding.⁴⁹⁴

144. We agree with NPCC that Qwest is obligated to comply with the *New Services Order*. This proceeding, however, is not the appropriate forum to consider whether Qwest has

⁴⁸⁷ See *Qwest 9-State Order* 17 FCC Rcd at 26571-72, para. 478 n.1746. Qwest states that it filed similar contracts with the application states on January 9, 10, or 13, 2003. Qwest filed the instant section 271 application on January 15, 2003.

⁴⁸⁸ *Qwest 9-State Order*, 17 FCC Rcd at 26577, para. 486.

⁴⁸⁹ NPCC is a trade association of non Incumbent LEC payphone service providers in the Northwest, including the State of Oregon.

⁴⁹⁰ NPCC Comments at 1 (citing *Wisconsin Public Service Commission*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) (*New Services Order*)). This order requires a BOC to set nondiscriminatory cost-based rates for payphone access lines at no more than the monthly recurring direct costs incurred by the BOC in providing payphone lines, plus a justified allocation for overhead. *Id.*

⁴⁹¹ NPCC Comments at 1.

⁴⁹² *Id.* at 2.

⁴⁹³ *Id.* at 3. NPCC asserts, e.g., that Qwest has argued in Oregon that the *New Services Order* allows it to file PAL rates that are identical to its business line rates, but argued in Iowa that setting PAL rates at that level is inconsistent with that Order.

⁴⁹⁴ Qwest Reply at 49; Qwest Thompson/Freeberg Reply Decl., para. 27 (both citing the *Qwest 9-State Order*).

done so in Oregon. In the *Qwest 9-State Order*, we rejected virtually the identical allegation by NPCC and other payphone associations with respect to other states served by Qwest.⁴⁹⁵ In that order, we concluded that it is inappropriate in a section 271 proceeding to decide whether Qwest's PAL rates comply with the *New Services Order*.⁴⁹⁶ As we stated, the issue raised by NPCC is better addressed through the Commission's enforcement complaint process or by the state commission in the first instance.⁴⁹⁷ Indeed, we understand that several of the payphone associations have begun the process of filing a complaint with the Commission's Enforcement Bureau to resolve this issue.⁴⁹⁸

D. Alleged Violations of Section 271

145. AT&T and Touch America argue, as they did in the *Qwest 9-State* proceeding, that alleged current violations of section 271 require a finding that Qwest's application is not in the public interest and thus must be denied.⁴⁹⁹ For the same reasons discussed in the *Qwest 9-State Order*, we reject these arguments.⁵⁰⁰ These arguments concern issues that are the subject of two complaints by Touch America pending before the Commission's Enforcement Bureau.⁵⁰¹

146. As the Commission recognized in the *Qwest 9-State Order*, Qwest had terminated all in-region interLATA services disclosed during the *Qwest 9-State* proceeding.⁵⁰² Qwest has recently disclosed additional instances of provisioning long distance service without

⁴⁹⁵ *Qwest 9-State Order*, 17 FCC Rcd at 26580, para. 494. NPCC and other payphone associations filed comments against the *Qwest I* and *Qwest II* applications, arguing that Qwest had failed to comply with the *New Services Order* in the 9-States covered by those applications. See Joint Comments of the Arizona Payphone Association, Colorado Payphone Association, Minnesota Independent Payphone Association and NPCC on the *Qwest I* application, (filed July 3, 2002) and on the *Qwest II* application (filed Aug. 2, 2002). The parties asked the Commission to withhold section 271 approval until Qwest complied with the *New Services Order* in those states.

⁴⁹⁶ *Qwest 9-State Order*, 17 FCC Rcd at 26580, para. 494.

⁴⁹⁷ *Id.* Qwest notes in its comments that it entered into a stipulated agreement with NPCC on Feb. 14, 2003, to lower payphone access rates in Oregon. *Qwest Reply* at 49 n.55; *Qwest Thompson/Freeberg Reply Decl.*, para. 27 n.42. Since NPCC does not provide any response to this, we do not know if this issue is completely resolved.

⁴⁹⁸ *Id.* (citing the Payphone Associations' *Qwest III* Comments at Attach.).

⁴⁹⁹ See *AT&T Comments* at 35-37; *Touch America Comments* at 4-5.

⁵⁰⁰ See *Qwest 9-State Order*, 17 FCC Rcd at 26577-79, paras. 487-90.

⁵⁰¹ *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 (February 11, 2002) (revised and refiled March 1, 2002) (alleging that Qwest's divestiture of its in-region interLATA assets and customers to Touch America was a sham and that Qwest provides in-region interLATA service in violation of section 271 and its merger conditions); *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (February 8, 2002) (arguing that "lit capacity IRUs" that Qwest provides are prohibited in-region interLATA services in violation of section 271).

⁵⁰² See *Qwest 9-State Order*, 17 FCC Rcd at 26577-78, para. 488.

authorization under section 271.⁵⁰³ Specifically, Qwest identified six additional in-region interLATA private line services not divested prior to the merger.⁵⁰⁴ Qwest has notified us that it terminated all six of these circuits by March 24, 2003.⁵⁰⁵ Qwest also disclosed 33 other instances of in-region interLATA private line services that it terminated at various points after the merger.⁵⁰⁶ In addition, Qwest stated that it was taking steps with respect to private lines provided to Triumph Communications to ensure that Qwest has sufficient control over cross connections to be certain that in-region interLATA communications do not occur.⁵⁰⁷ Qwest has notified us that the out-of-region interLATA service previously provided using these leased cross-connect panels is no longer being used.⁵⁰⁸ Finally, Qwest disclosed wholesale transport services provided to Touch America for operator services and Dial Access Network Link services provided to ISPs.⁵⁰⁹ We have been notified by Qwest that it has implemented routing changes and transferred service to other providers to address these issues.⁵¹⁰

147. In response to Qwest's disclosure, AT&T requests that the Commission deny the instant application.⁵¹¹ AT&T maintains that the disclosed instances are violations of section 271.⁵¹² AT&T argues that these violations along with Qwest's "liberal use of [IRUs]" demonstrate that these are not limited circumstances, as the Commission concluded in the *Qwest 9-State Order*, and instead establish "Qwest's pattern of abuse and non-compliance with respect to Section 271" that warrants a denial of the application.⁵¹³

⁵⁰³ See Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 7, 2003) (Qwest Mar. 7 *Ex Parte* Letter).

⁵⁰⁴ See Qwest Mar. 7 *Ex Parte* Letter, Attach. at 1.

⁵⁰⁵ See Letter from Dan Poole, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 21B, 2003); Letter from Dan Poole, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 25A, 2003).

⁵⁰⁶ See Qwest Mar. 7 *Ex Parte* Letter, Attach. at 2.

⁵⁰⁷ *Id.*

⁵⁰⁸ See Letter from Dan Poole, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed April 9, 2003).

⁵⁰⁹ See Qwest Mar. 7 *Ex Parte* Letter, Attach. at 2-3.

⁵¹⁰ See Letter from Dan Poole, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed April 4C, 2003).

⁵¹¹ See Letter from Mark D. Schneider, Counsel to AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 (filed March 27, 2003) (AT&T Mar. 27 *Ex Parte* Letter).

⁵¹² *Id.* at 2.

⁵¹³ *Id.* at 2-3.

148. We recognize that potential violations of federal telecommunications law could be relevant to the section 271 inquiry.⁵¹⁴ However, based on the limited circumstances established in this record, we do not find that the allegations concerning Qwest's compliance with section 271 relate to openness of the local telecommunications markets to competition.⁵¹⁵ Instead, we defer any enforcement action pending the Enforcement Bureau's investigation of this matter. Therefore, we reject the argument of AT&T and Touch America that we should deny or delay this application based on allegations concerning Qwest's compliance with section 271. We emphasize, however, that regardless of what enforcement action we may take in the future concerning these or similar allegations, BOCs are prohibited from providing long distance service in any in-region state prior to receiving section 271 approval from the Commission for that particular state, and they must implement adequate controls to prevent such service from taking place.⁵¹⁶

VII. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

149. Section 271(d)(6) of the Act requires Qwest to continue to satisfy the "conditions required for . . . approval" of its section 271 application after the Commission approves its

⁵¹⁴ See *Qwest 9-State Order*, 17 FCC Rcd at 26578-79, para. 490; *Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660, 18754-55, para. 168 (2002) (*Verizon Delaware/New Hampshire Order*); see also *Verizon New Jersey Order*, 17 FCC Rcd at 12368, para. 190.

⁵¹⁵ See *Qwest 9-State Order*, 17 FCC Rcd at 26578-79, para. 490; *BellSouth Multistate Order*, 17 FCC Rcd at 17764-65, para. 301; see also *Verizon New Jersey Order*, 17 FCC Rcd at 12368, para. 190.

⁵¹⁶ Qwest recently disclosed that television commercials marketing interLATA services mistakenly ran in Arizona, Minnesota, New Mexico and Oregon on April 7 and 8, 2003. See Letter from Mace J. Rosenstein, Counsel to Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11, Attach. 1 at 1-2, Attach. 2 at 1-2 (filed April 10, 2003) (Qwest Apr. 10 *Ex Parte* Letter) (attaching letter from advertising agency indicating that advertisements ran as a result of agency's error). Qwest adds that the commercials included a visual disclaimer limiting the offer to states in which Qwest has been granted section 271 authority and it acted quickly to remove the advertising as soon as it became aware that it was being aired. See Qwest Apr. 10 *Ex Parte* Letter, Attach. at 1-2. Qwest confirms that, despite the premature marketing, it did not provision long distance service to any customers in these states and that it has in place various controls to ensure that it does not provision long distance in states without section 271 authority. See Letter from John L. Munn, Corporate Counsel – Policy and Law, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-11 at 1-2 (filed April 11C, 2003). The Commission has examined instances of premature marketing in prior section 271 proceedings. See, e.g., *Verizon Virginia Order*, 17 FCC Rcd at 21990-94, paras. 199-207; *Verizon Delaware/New Hampshire Order*, 17 FCC Rcd at 18751-55, paras. 163-68; *Verizon New Jersey Order*, 17 FCC Rcd at 12367-68, paras. 188-90. We conclude, given the facts presented here, that this conduct does not relate to the openness of the local telecommunications markets to competition, and therefore, does not warrant denial or delay of this application under the public interest standard. See *Verizon Virginia Order*, 17 FCC Rcd at 21994, para. 207. We find that these claims of premature solicitation of long distance services would be more appropriately addressed in an enforcement proceeding. We take no position in this proceeding on whether Qwest's actions violate section 272(g)(2) of the Act.

application.⁵¹⁷ Thus, the Commission has a responsibility not only to ensure that Qwest is in compliance with section 271 today, but also that it remains in compliance in the future. As the Commission has already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do so again here.⁵¹⁸

150. Working in concert with the New Mexico, Oregon and South Dakota Commissions, we intend to closely monitor Qwest's post-approval compliance for these states to ensure that Qwest does not "cease [] to meet any of the conditions required for [section 271] approval."⁵¹⁹ We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open in these states. We are prepared to use our authority under section 271(d)(6) if evidence shows market opening conditions have not been maintained.

151. We require Qwest to report to the Commission, for all three states, carrier-to-carrier performance metrics results and PAP monthly reports beginning with the first full month after the effective date of this Order, and for each month thereafter for one year unless extended by the Commission. These results and reports will allow us to review, on an ongoing basis, Qwest's performance to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these three states.⁵²⁰

VIII. CONCLUSION

152. For the reasons discussed above, we grant Qwest's joint application for authorization under section 271 of the Act to provide in-region, interLATA services in the states of New Mexico, Oregon and South Dakota.

⁵¹⁷ 47 U.S.C. § 271(d)(6).

⁵¹⁸ *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order*, 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4174, paras. 446-53.

⁵¹⁹ 47 U.S.C. § 271(d)(6)(A).

⁵²⁰ See, e.g., *Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, 15 FCC Rcd 5413 (2000) (adopting consent decree between the Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of \$3,000,000 to the United States Treasury, with additional payments if Bell Atlantic failed to meet specified performance standards and weekly reporting requirements to gauge Bell Atlantic's performance in correcting the problems associated with its electronic ordering systems).

IX. ORDERING CLAUSES

153. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 271, Qwest's joint application to provide in-region, interLATA service in the states of New Mexico, Oregon and South Dakota filed on January 15, 2003, IS GRANTED.

154. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE April 25, 2003.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in dark ink, appearing to read "Marlene H. Dortch", is written over the printed name.

Marlene H. Dortch
Secretary

